

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7020

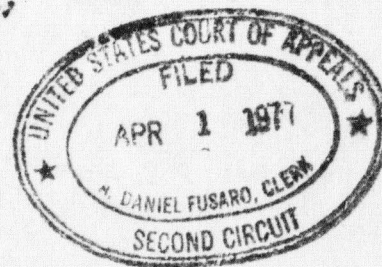
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INTERNATIONAL SILVER COMPANY,
Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, AND LOCAL #7770
U.S.W.A. AND ANTONIO ARESKO,

Defendant-Appellees.



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLEES

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v.

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U.S.W.A. AND ANTONIO ARESKO,

Defendant-Appellees.

BRIEF FOR APPELLEES

COUNTER-STATEMENT OF THE ISSUE

The issue presented for review is whether the District Court properly entered a judgment denying the plaintiff's petition to vacate a labor arbitration award and granting the defendants' counterclaim to confirm the award on the basis that the award draws its essence from the parties' collective bargaining agreement.

COUNTER-STATEMENT OF THE CASE

Events Preceding the Filing of this Lawsuit.

The United Steelworkers of America, AFL-CIO, and Local Union No. 7770, United Steelworkers of America (hereinafter

jointly called "the Unions"), as the exclusive collective bargaining representatives for the production, maintenance and shipping employees at International Silver Company's (hereinafter called "the Company") Meriden, Connecticut plants, entered into its first collective bargaining agreement with the Company on March 25, 1973 (A. 10).^{1/}

Prior to the advent of unionization at the Company's Meriden plants in December of 1971, the Company had established a rule that in the event any of its employees accumulated a minimum of five years of continuous service at the time of layoff, they would not suffer a break in continuous service with the concomitant loss of seniority rights unless the layoff extended for more than one year (A. 40). However, when the Unions and the Company entered into their first collective bargaining agreement, this rule was revoked and supplanted by Article X, Section 3(g) which provided:

"Section 3. A break in an employee's continuous service thereby resulting in a loss of seniority shall result from any one of the following circumstances.

. . . .

"(g) If he had two (2) or more years of continuous service with the Company at the time of layoff for lack of work and such layoff continues for more than two (2) years."
(Emphasis added.) (A. 14-15).

^{1/} The Joint Appendix is referred to herein as "A."

Under the terms of this provision, if an employee accumulated a minimum of two years of continuous service at the time of layoff, he or she would not suffer a break in continuous service unless the layoff extended for more than two years, as opposed to one year under the Company's pre-contract rule.

The parties also incorporated in Article XVII, Sections 2(f) and (g) and 4(g), (h) and (i) of their first collective bargaining agreement authorization for a red circle policy.^{2/}

^{2/} Article XVII, Sections 2(f) and (g) and 4(g), (h) and (i) of the collective bargaining agreement read as follows:

"Article XVII
Wages

. . .

Section 2.

. . .

f) All incentive employees covered by this Agreement whose current hourly base rate plus sidecar is above job rate will be increased in accordance with subsections (a) and (b) herein, except that such sidecars will be adjusted downward by an amount equal to the increase in the increment for their applicable pay grade.

g) All incentive employees who have not been installed under the standard hour plan will receive an additional cent-per-hour increase in accordance with their applicable pay grade as set forth in subsection (a) herein to be applied independently to each hour worked; except, however, that when such employees are installed under the standard hour plan, any resulting sidecar shall be reduced at the time of installation by the amount of the increase in the increment.

. . .

Section 4.

. . .

g) All incentive employees covered by this Agreement whose current hourly base rate plus sidecar is above job rate will be increased in accordance with subsection (c)
/ / / / /

Under this policy, the Company gave employees "sidecar payments" in order to preserve earnings levels attained prior to the Company's changeover in February, 1971 from a piece rate system to an incentive system (A. 52-53).

However, during the term of the 1973 collective bargaining agreement, the Company refused to give sidecar payments to that category of employees who had suffered a break in continuous service under the pre-contract rule because they were laid off for more than one year but who would not have suffered a break under Article X, Section 3(g) of the agreement because they had been laid off for less than two years. On August 21, 1973, one such employee, Antonio Aresco, on behalf

2/ (Continued from page 3).

"herein except that such sidecars will be adjusted downward by an amount equal to the increase in the increment for their applicable pay grade.

h) All incentive employees who have not been installed under the standard hour plan will receive an additional cent-per-hour increase in accordance with their applicable pay grade as set forth in subsection (a) herein to be applied independently to each hour worked; except, however, that when such employees are installed under the standard hour plan, any resulting sidecar shall be reduced at the time of installation by the amount of the increase in the increment.

i) In addition to the provisions of subsection (f) and (g) herein, red circle and sidecar employees will receive two-hundred dollars (\$200) as compensation for a downward revision of their red circle/sidecar protection by ten cents per hour (10¢/hr.). Earnings protection will remain at the job rate and in those cases where a sidecar/red circle is less than 10 cents per hour, the lump sum payment will be the red circle/sidecar in cents-per-hour divided by ten (10) times \$200." (Emphasis added.) (A. 19-21).

of himself and others similarly situated, submitted a grievance^{3/} alleging that under the terms of the new collective bargaining agreement, the Company should grant the grievants sidecar monies payable after the "official date of the agreement." Aresco argued that the terms of the collective bargaining agreement removed the break in service which had been effected by the Company's invalidated pre-contract rule, thereby removing the bar to sidecar payments -- benefits contingent on continuous service.

3/ Antonio Aresco's grievance, submitted on August 21, 1973, stated:

"Grievance Form

. . .

Nature Of Grievance And Facts Then Known:

I the undersigned claim that the company by denying me a sidecard [sic] is guilty of acting in a discriminatory nature, and is in violation of Federal Labor Laws, pertaining to equal pay for equal work. As these sidecards [sic] and red circle rates are supposedly [sic] based on average hourly earnings of 1970, I feel that the company by agreeing to adjust the seniority rights of those of us who were laid off in 1970, that it gave up its claim to any break in service or that I along with those employees similar [sic] affected are 'new' help.

Remedy Requested:

That a sidecard [sic] or red circle rate based on the 1970 average hourly earnings be given to me and those affected by the layoffs of 1970 and that we be compensated retroactively to official date of agreement to restore our seniority." (A. 70).

The Aresco grievance was processed through the first four steps of the grievance procedure without resolution and was then referred to arbitration, in accordance with Article IX of the labor agreement^{4/} (A. 11-14). Article IX, Section 2(c) of the agreement specifies that arbitration decisions "shall be final, conclusive and binding upon all employees, the Company and the Union." (A. 13). Pursuant to the procedures spelled out in the agreement, Arbitrator Lewis M.

4/ In the brief for the appellant submitted in this case, the Company argues (at p. 9) that Antonio Aresco did not file his grievance so as to comply with the terms of Article IX, Section 1 of the agreement because he did not specify which particular contract provisions were the subject of his grievance.

It is the position of the Unions, et al. that inasmuch as this argument was not presented to Arbitrator Gill, it cannot be raised for the first time in the federal courts.

Moreover, even if the Company's argument were appropriate for this Court's consideration, it is not supported by the language of Article IX, Section 1 of the agreement which provides, in pertinent part:

"When the grievance is reduced to writing there must be set forth in the spaces provided the following:

. . . .

(b) The violation, if any, of the agreement which is alleged;" (A. 12).

Rather than requiring the designation on the grievance form of the particular contract provision alleged to be violated, Article IX, Section 1 merely charges the grievant with describing the nature of the violation of the agreement.

Gill, an experienced and nationally-renowned arbitrator,^{5/} was designated to decide the dispute (A. 24).

On May 8, 1974, Arbitrator Gill held a hearing in the Aresco case under the auspices of the American Arbitration Association. It is undisputed that at the hearing, representatives of the Company and the Unions were accorded ample opportunity to submit evidence and cross-examine witnesses. Having been thus fully apprised, Arbitrator Gill weighed the evidence and arguments, articulating his deliberations in a five page opinion (A. 25-30), and issued an award on June 4, 1974, granting, in substance, the relief requested by Antonio Aresco's grievance:

"Grievance No. E-73-110 is upheld. Antonio Aresco and other employees similarly situated shall be granted the sidecar payments in question, retroactive to August 17, 1973."
(A. 24).

In his accompanying opinion, the Arbitrator discussed the meaning and application of express terms of the collective bargaining agreement establishing the right of employees to retain accumulations of continuous service upon recall, as well as their right to sidecar payments under the red circle

^{5/} Mr. Gill's biography is published in BNA, "Directory of Arbitrators," in "Labor Arbitration Cumulative Digest and Index covering Volumes 41-50" at p. 1216, and is reproduced as an Appendix to Brief For Appellees.

policy (A. 26-29). However, the Arbitrator found that the parties never reached agreement as to the very specific issue before him of the right of employees in Aresco's position to post-contract sidecar payments. The Arbitrator looked for guidance as to the parties intent in applying these cryptic provisions to the specific issue before him by referring to the bargaining history culminating in the 1973 labor agreement. However, in presenting their cases, Union Staff Representative John Sartori and Company Personnel Director Kendall Trenchard each testified to differing versions of that history. As his opinion demonstrates, Arbitrator Gill evaluated the credibility and weighed the testimony of both witnesses before reaching conclusions of fact:

"Sartori's testimony was more detailed and convincing than Trenchard's, and I conclude that there was not any specific discussion of the precise point at issue here, and that there was a general agreement of the sort described by Sartori (and not specifically denied by Trenchard). That general agreement, I find, was to the effect that whatever agreement on extending recall rights was reached, would be applied to all benefits dependent on length of service. . . ." (A. 28)

In accordance with these evidentiary determinations, the Arbitrator found that the parties had orally agreed during the course of negotiations that any such contract provision as they might devise concerning the accumulation of continuous service upon recall would have retroactive application for

purposes of determining all benefits contingent on length of service (A. 28). The Arbitrator also found that although the evidence showed that sidecar payments were one of the benefits contingent on length of service (A. 29, 52-53), there had been no discussion during negotiations about the particular question of Aresco, et al's entitlement to the sidecar payments under the future labor contract (A. 28).

Using this bargaining history as an indication of the parties' intent, Arbitrator Gill proceeded to interpret and apply the express contract provisions to the facts of the Aresco case:

"I am persuaded that the answer to that question should be in the affirmative. The policy on sidecar payments is essentially a red circle policy, maintaining the earnings level for present employees, but not extending those higher rates (or payments) to newly hired employees who did not have any higher level of earnings to protect, or who, if they had worked in 1970 and established such higher levels, had been laid off since for such a long period as to lose their recall rights and were therefore in the category of new hires when they returned. Up until the contract was signed in 1973, Aresco and others similarly situated were in this last category, and the denial of sidecar payments to them was proper under the then-existing policy. But once the contract was signed, they were removed from the category of new hires, and were credited with continuous service from their original date of hire. Under the established policy as to sidecar payments, I believe that entitled them to the payments." (Emphasis Added.) (A.29).

The Arbitrator also interpreted Article IX, Section 3 of the agreement as requiring that the sidecar payments be made retroactive to August 17, 1973, when the Company issued a revised seniority listing showing which employees were entitled to the sidecar monies (A. 29-30).

Since Arbitrator Gill issued his opinion and award, the Company has refused to abide by the terms of that decision and has continued to deny sidecar payments to Aresco and other similarly situated employees. This has created a most anomalous situation, indeed, in view of the fact that the Company has also continued to pay those same employees other contractually authorized benefits determined on the basis of seniority adjusted retroactively under Article X, Section 3(g) of the agreement to encompass service accumulated from each employee's original date of hire (A. 27).

Proceedings in the District Court.

On June 2, 1974, the Company commenced an action in Connecticut Superior Court seeking to vacate the Gill award (A. 3-6). On petition of the Unions, et al., the cause was removed to the United States District Court for the District of Connecticut. The Unions, et al. filed in that Court their answer and counterclaim seeking confirmation of the award (A. 1). The parties filed cross motions for summary judgment,

and the District Court denied both motions on the ground that a genuine issue of material fact was present (A. 71-73).

On June 15, 1976, a trial was had in the District Court and both parties submitted post-hearing briefs (A. 2). By its Memorandum of Decision, dated December 1, 1976, and Judgment entered on December 12, 1976, the District Court denied the Company's petition to vacate the award and granted the Unions, et al.'s counterclaim to confirm the award (A. 74-79).

The District Court's Opinion.

The District Court confirmed the Gill award on the basis that the Arbitrator had employed legitimate contract construction techniques and that his award drew its essence from the collective bargaining agreement:

"The record presented to this Court at trial reveals that the retroactive application of the provision on recall rights was discussed during the contract negotiations in March 1973. At that time, plaintiff agreed orally, although not in writing, that an agreement would be worked out extending seniority benefits retroactively to employees who had lost these rights when recalled under the former policy but would have been eligible for them under the new contract provision. The plaintiff has never disputed making this agreement and, in fact, did restore seniority rights to defendant Aresco and workers similarly situated. However, it refused to institute sidecar payments because these allegedly constituted a monetary liability which the company had refused to accept. 2/
/ / / / /

"In finding that defendant Aresco was entitled to seniority benefits as of the signing of the 1973 contract, the arbitrator relied on the bargaining history of the contract in order to determine the intended scope of the recall provision. Cf. Medo Photo Supply Corp. v. Livingston, supra. But he was neither using his power 'to add to or subtract from or modify in any way any of the terms of this Agreement,' Joint Ex. A, Art. IX, Section 2(d), nor was he looking to past practice to find that a benefit was implied in the terms of the agreement, see Torrington Co. v. Metal Product Workers Union Local 1645, supra. The oral agreements entered into between the parties draw their essence from the collective bargaining agreement as part of the contract negotiations. They are essential to a correct construction and application of the contract; and therefore, the arbitrator's decision was within his delegated power." (Footnote omitted) (A. 76-77).

ARGUMENT

It is remarkable that seventeen years after the Supreme Court in the "Steelworkers Trilogy"^{6/} unequivocally established the position of the arbitrator as the bargained-for interpreter of collective bargaining agreements, a litigant has the audacity to appeal a District Court's decision confirming an arbitrator's award involving a question of contract interpretation. Notwithstanding the fact that this award is the why and wherefore

^{6/} United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

of arbitration, the legal contentions advanced by the Company have no basis in the decisions of the United States Supreme Court, this Court or any other Court of Appeals.

- I. Pursuant To The Precedent Established In The Humble Oil Case, The District Court Properly Found That Arbitrator Gill Did Not Exceed His Authority By Referring To The Parties' Bargaining History In Construing The Collective Bargaining Agreement, And That His Award Draws Its Essence From The Collective Bargaining Agreement.

As this Court is undoubtedly aware, it is universally acknowledged that the national labor policy favors arbitration as the means for resolving disputes under collective bargaining agreements. Under this policy, the Supreme Court has strictly circumscribed the court's role in reviewing an arbitrator's award:

"The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."

"[A]rbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level--disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements."

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"When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem."

. . .

"Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement."

. . .

"A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award."

. . .

"[The] plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. This underlines the fundamental error which we have alluded to in *United Steelworkers of America v. American Manufacturing Co.*, [363 U.S. 564]. As we there emphasized the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction
/////

of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." (Emphasis supplied). United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597-599 (1960). 7/

Moreover, the Enterprise Wheel doctrine, as consistently applied by the courts, firmly established that judges reviewing arbitration awards are not to substitute their conclusions of fact or law for those of the arbitrator. Medo Photo Supply Corp. v. Livingston, 274 F. Supp. 209, 215 (S.D.N.Y. 1967),

7/ It is interesting to note that some Courts of Appeals have developed their own unique elaborations of the Supreme Court's "essence from the agreement" standard. For example, in Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 (3rd Cir. 1969), the Third Circuit Court of Appeals described the standard as follows:

" . . . a labor arbitrator's award does 'draw its essence from the collective bargaining agreement' if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention."

And, in Aloha Motors, Inc. v. ILWU Local #142, 530 F.2d 848, 849 (9th Cir. 1976), the Ninth Circuit Court of Appeals reiterated with approval its previous elaboration of the standard:

" ' . . . if, on its face, the award represents a plausible interpretation of the contract in the context of the parties' conduct, judicial inquiry ceases and the award must be affirmed.' Holly Sugar Corp. v. Distillery, Rectifying, Wine and A.W.I.U., 412 F.2d 899, 903 (9th Cir. 1969)."

As their pronouncements make clear, both Courts of Appeals understood the role of the arbitrator to include the use of collateral evidence reflective of the parties' intentions in rendering an award which draws its essence from the collective bargaining agreement.

aff'd mem., 386 F.2d 451 (2nd Cir. 1967); Bridgeport Rolling Mills Co. v. Brown, 314 F.2d 885, 886 (2nd Cir. 1963), cert. denied, 375 U.S. 821 (1963); NF&M Corp. v. United Steelworkers of America, 524 F.2d 756, 759 (3rd Cir. 1975); Amalgamated Butcher Workmen Local Union No. 641 v. Capitol Packing Co., 413 F.2d 668, 672 (10th Cir. 1969); Dallas Typographical Union v. Belo Corp., 372 F.2d 577 (5th Cir. 1967).

It is with these cases in mind that we now turn to the arbitration award in issue in the case at bar. The parties do not dispute the contractual grant of authority to the arbitrator to decide the basic subject matter of the propriety of the Company's denial of post-contract sidecar payments to Antonio Aresco and other similarly situated employees under Article X, Section 3(g) and the red circle policy set forth in the collective bargaining agreement. Nor does the Company challenge the fact that Arbitrator Gill was fully apprised of all facts and contractual provisions which both parties considered pertinent to the disposition of the Aresco grievance. Indeed, the opinion accompanying Arbitrator Gill's award leaves no room for doubt that he deliberated at length over the evidence and arguments submitted before making his award.

Rather, the Company contends that the Gill award should be vacated because the Arbitrator relied solely on "extraneous oral agreements" which would add to and amend the labor contract

in contravention of the arbitrator's authority delineated in Article IX, Section (d).^{8/} However, as the District Court found and as the record readily shows, the Company's contentions have no basis in fact or law.

8/ In the brief for the appellant, the Company also contends (at pp. 8, 14-28) that Arbitrator Gill's award should be vacated because the so-called "extraneous oral agreements," upon which the arbitrator is alleged to have exclusively relied, are contrary to the written labor agreement, and because the Gill award contradicts the "unambiguous" language of the contract. The Company argues that Arbitrator Gill thumbed his nose at Article IX, Section 2(b), Article XVII, Section 2(f) and the Preamble of the contract when he found that the seniority of Aresco and other similarly situated employees should be adjusted under Article X, Section 3(g) of the agreement to reflect continuous service accumulated from their original date of hire, thereby entitling such employees to sidecar payments.

This is mere grasping at straws. It cannot be emphasized enough that the arbitrator's findings of fact and contract interpretations are for him alone and do not properly come within the purview of this Court. United Steelworkers of America v. Enterprise Wheel & Car Corp., supra at 596, 599; Local Union No. 135 of United Rubber, Cork, Linoleum and Plastic Workers of America v. Dunlop Tire and Rubber Corp., 391 F.2d 897, 900 (2nd Cir. 1968); Medo Photo Supply Corp. v. Livingston, supra at 213, 215.

However, even if the Court were to transgress the strict limit set on its reviewing power in this type of case, the Court would find that the Company's argument grossly distorts these contract provisions inasmuch as they are said to be decisive of a matter upon which they have no bearing whatsoever. For example, the Preamble merely states the effective date of the contract, the parties to it, and the place of its execution. Similarly, Article XVII, Section 2(f) merely states the interrelation between a general wage increase and sidecar payments. That Section 2(f) makes reference to employees who receive a "current hourly base rate plus sidecar" (emphasis added) tells us nothing in relation to the retroactive accumulation of seniority in controversy in the Aresco case. This is especially

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The contention that the Arbitrator relied solely on "extraneous oral agreements" in reaching his decision is belied by the fact that the opinion accompanying his award is replete with detailed analyses of the content of express contract provisions applied to resolve the Aresco grievance. In his opinion, Arbitrator Gill explicitly discussed the meaning and application of the contract provision defining the right of recalled employees to continuous service accumulations (Article X, Section 3(g)), the sidecar payment policy (Article XVII), and the provision dealing with the retroactivity of arbitration awards (Article IX, Section 3). But although the contract contained these three provisions dealing with the separate elements

8/ (Continued from page 17).

true in view of the fact that Article XVII, Section 2(g) makes reference to employees who may in the future come under the standard hourly plan and, therefore, receive "resulting sidecar" (emphasis added) payments. Finally, the Company's argument that Article IX, Section 2(b) prohibits the Gill award was raised before the Arbitrator who disposed of it in a footnote in his accompanying opinion:

"1/ The Company advance an arbitrability argument, saying that the grievance should be dismissed under Section 2(b) of Article IX, which excludes from arbitration any 'grievance, dispute, misunderstanding or difference between the parties which occurs prior to the execution of this Agreement.' I find no merit in that connection -- this dispute did not arise until after the Agreement was executed, although of course it involved the status of Aresco and the others under the Agreement, because of their earlier layoffs and recalls." (A. 28).

of the parties' dispute -- seniority rights of recalled employees, sidecar payments and the retroactivity of arbitration awards, the Arbitrator was confronted with the problem that none of them, read separately or together, dealt with the precise claim raised by Aresco. More specifically, these contract provisions were not clear as to whether there existed a right to sidecar payments for those employees whose continuous service had been broken under the Company's pre-contract rule but whose service would not have been broken under the new rule set forth in Article X, Section 3(g) of the agreement. Consequently, the Arbitrator needed some indication of how the parties intended these contract provisions to be applied to the narrow issue presented by Aresco's claim. Arbitrator Gill looked for that indication in the parties' bargaining history, which he found, upon the evidence submitted, to be embodied in oral agreements reached during the course of negotiations.^{9/}

Because Union witness John Sartori and Company witness Kendall Trenchard testified to conflicting versions of the bargaining history, Arbitrator Gill, in his role as fact finder,

^{9/} Incidentally, Arbitrator Gill's reference to oral negotiating history in order to ascertain the parties' intent is squarely within the mainstream of arbitral practice. Sidney Wanger & Sons, Inc., 46 Lab. Arb. 426, 428-429 (1966) (Dolnick, Arb.); Lehigh Portland Cement Co., 42 Lab. Arb. 458, 465 (1964) (Hebert, Arb.); Elkouri, F. and Elkouri, E. A., How Arbitration Works, 302, 313 (3d ed. 1974).

determined the credibility of each witness and evaluated the weight to be accorded their testimony as follows:

"Sartori's testimony was more detailed and convincing than Trenchard's, and I conclude that there was not any specific discussion [during negotiations] of the precise point at issue here, and that there was a general agreement of the sort described by Sartori (and not specifically denied by Trenchard)."

(Emphasis added.) (A. 28).

Having determined that the Union witness submitted the most persuasive evidence, Arbitrator Gill found that the parties had entered into certain oral agreements which were part and parcel of the bargaining process. More specifically, on the basis of uncontradicted testimony, he found that the parties had orally reached a general consensus "to the effect that whatever agreement [now Article X, Section 3(g)] on extending recall rights was reached, would be applied to all benefits dependent on length of service." (A. 28). Inasmuch as he also found sidecar payments to be contingent on continuous service, Arbitrator Gill concluded that the parties intended sidecar payments to be made to employees on the basis of continuous service adjusted under Article X, Section 3(g) of the agreement. As this Court is cognizant, these evidentiary determinations and findings of fact, are within the exclusive domain of the arbitrator and not subject to judicial review. Bridgeport Rolling Mills Co. v. Brown, supra at 886; Medo Photo Supply Corp. v. Livingston, supra at 213, 215; NF&M

Corp. v. United Steelworkers of America, supra at 759. But, Arbitrator Gill did not simply stop there and issue his award on the basis of the parties' bargaining history alone. Rather, he turned to the written contract and applied its Article IX, Section 3, Article X, Section 3(g) and the sidecar policy contained in Article XVII to the Aresco case in light of the parties' intent as gleaned from their bargaining history embodied in oral agreements.^{10/}

^{10/} In its brief to this Court, the Company relies on Torrington Co. v. Metal Products Workers Union Local 1645, 362 F.2d 677 (2nd Cir. 1966) and Timken Co. v. Local Union 1123, United Steelworkers of America, 482 F.2d 1012 (6th Cir. 1973), as support for its contention that this Court must vacate the Gill award on the ground that the arbitrator improperly predicated his decision on the parties' bargaining history even though there allegedly existed express and unambiguous contract language to the contrary. The Company's reliance is misplaced.

In the Torrington case, the Court, five years prior to its Humble Oil decision, affirmed a District Court's order vacating an award because the arbitrator ignored the parties' intent manifested in their bargaining history and read a benefit into the contract which was not there. The Court took the arbitrator to task for not having heeded the import of the parties' negotiating history. In contrast, in the instant action, Arbitrator Gill based his award on rights clearly authorized by the contract. Indeed, the right to sidecar payments is recognized in Article XVII and the right to continuous service upon recall in Article X, Section 3(g). Arbitrator Gill looked to the parties' bargaining history for the sole purpose of discovering how the parties intended those two provisions to mesh in relation to Aresco, et al.'s entitlement to sidecar payments, since Article XVII and Article X, Section 3(g) were opaque in regard to that narrow question.

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That the Arbitrator referred to the parties' bargaining history in the form of oral agreements in reaching his decision does not change the fact that his award is grounded in the collective bargaining agreement and, therefore, draws its essence from the agreement. To the contrary, the Supreme Court and the Second Circuit Court of Appeals have been adamant that in interpreting a collective bargaining agreement it is permissible and, indeed, often necessary to go beyond the four corners of the contract itself and examine the agreement history to ascertain the intent behind the agreement and to determine the rights and duties of the parties. United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582 (1960); Humble Oil and Refining Co. v. Local 866, Int'l Bro. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 447 F.2d 229, 232 (2nd Cir. 1971); American Machine and Foundry

10/ (Continued from page 21.)

In the Timken case, the Court affirmed a District Court's decision vacating an award because the arbitrator, rather than adhere to the explicit contract definition of the term "quit," used his own conflicting definition of the term, which had no basis in the collective bargaining process or the common law of the shop. In holding that the arbitrator exceeded his authority, the Court was critical of him for neglecting to look to collateral evidence in order to ascertain the parties' intent as to the application of the term. Thus, Timken, supra, is completely inapposite to the case at bar where Arbitrator Gill, rather than contradicting any express contract language, premised his decision on general but express contract language, in the context of the parties' intent revealed by their bargaining history.

Co. v. United Automobile, Aerospace & Agricultural Implement Workers of America, Local 116, 256 F. Supp. 161, 163 (S.D.N.Y. 1963), aff'd, 329 F.2d 147 (2nd Cir. 1964); accord, Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. White Motor Corp., 505 F.2d 1193, 1197-1198 (8th Cir. 1974), cert. denied, 421 U.S. 921 (1975); Anaconda Co. v. Great Falls Mill & Smeltermen's Union No. 16, 402 F.2d 749, 752 (9th Cir. 1968). This necessity arises from the very nature of the collective bargaining agreement as a generalized code designed to govern a myriad of cases which no draftsman could wholly anticipate. United Steelworkers of America v. Warrior and Gulf Navigation Co., supra at 578. As one expert remarked, in noting that the arbitrator cannot expect to find the solution to every conceivable labor dispute on the face of the collective bargaining contract:

"There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words." Cox, "Reflections Upon Labor Arbitration," 72, Harv. L. Rev. 1482, 1498-1499 (1959).

This Court has demonstrated its sensitivity to such realities of the workplace on more than one occasion. Humble Oil & Refining Co. v. Local 866, Int'l Bro. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, supra at 232; Bell Aerospace Co. Div. of Textron, Inc. v. Local 516, Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America, 500 F.2d 921, 923 (2nd Cir. 1974); Medo Photo Supply Corp. v. Livingston, supra at 213, 215; American Machine and Foundry Co. v. United Automobile, Aerospace & Agricultural Implement Workers of America, Local 116, supra at 163; cf., Columbia Broadcasting System, Inc. v. American Recording and Broadcasting Assn., 414 F.2d 1326 (2nd Cir. 1969).

In these cases, the Court has ruled that it is desirable if not sometimes obligatory, for arbitrators to look to bargaining history and/or agreements extraneous to the contract in order to ferret out the parties intent in vis-a-vis the application of the contract. According to the Court's decision in Humble Oil & Refining Co. v. Local 866, Int'l Bro. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, supra at 253 this contract construction technique is particularly appropriate where the arbitrator is faced with an "opaque but 'express provision' of the contract governing the rights at issue."

The Unions, et al. submit that the fact situation involved in the Humble Oil case is so strikingly similar to that now before the Court as to make the Court's decision in that

case dispositive of the instant action. In Humble Oil & Refining Co. v. Local 866, Int'l Bro. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, supra, Humble and the Teamsters were parties to a "Special Agreement," as well as a collective bargaining agreement. The Special Agreement provided the procedure for implementing a special reduction of force. The collective bargaining agreement provided an express but opaque provision defining recall rights. The dispute between the parties arose when Humble found that it had mistakenly laid off too many employees during a special reduction of force and offered such employees reinstatement on condition that they return a special severance payment. The Arbitration Board found for the Teamsters and ordered Humble to reimburse the reinstated employees for the amounts which they had repaid.

The Arbitration Board was faced with the task of deciding a dispute concerning a right expressly defined in the labor agreement but without sufficient specificity and elaboration as to address the narrow issue of how the procedures spelled out in the Special Agreement should be applied to resolve the dispute over the special severance payments. In order to fill the gap created by the opacity of the contractual provision generally covering the subject matter of the dispute, the Board made use of what this Court subsequently termed "a typical battery of construction techniques," including reference to the bargaining history behind the contract as well as the parties'

practices under predecessor contracts for evidence of their intent. Humble Oil & Refining Co. v. Local 866, Int'l Bro. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, supra at 232.

Humble brought an action to vacate or modify the award, contending, like the Company in the case at bar, that the Arbitration Board exceeded the scope of its authority by relying on the extraneous Special Agreement. The District Court dismissed the action and Humble appealed.

This Court held that inasmuch as the award did have a basis in an express contractual provision defining recall rights, the Board had not exceeded its authority and the award drew its essence from the contract, regardless of the fact that the Arbitration Board also premised its decision on the Special Agreement and the parties' bargaining history and past practices. In so holding, this Court articulated its full approval of the arbitrator's use of such collateral evidence for purposes of divining the parties intent vis-a-vis the contract provisions:

"To determine whether the Company had violated rights intended by the parties to be preserved by the language of that provision, the Board was required to discover the intent of the parties, and to do this it looked to evidence and not merely the cold and cryptic words on the face of the agreement which shed little light on the issue. We see nothing in the arbitration clause which forbids resort to such rudimentary tools of construction.
/ / / / /

If the Board were barred from resorting to bargaining history and rights established under similar language in past contracts, the parties to the contract would be remitted to securing arbitration only when there was a violation of a provision so plain and unambiguous as to require no collateral evidence of intent -- and we might add hardly requiring arbitration itself. To emasculate the arbitration clause, absent a more clear and definite intent that the parties intended it to have such a wooden effect and to be construed so antiseptically, would be contrary to the well-recognized presumption in labor law favoring private settlement of labor disputes." Humble Oil & Refining Co. v. Local 866, Int'l Bro. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, supra at 232-233. (Emphasis added.)

Thus, in the view of the Second Circuit Court of Appeals, the arbitrator's resort to this type of collateral evidence was not only a permissible tool of contract construction, but one that was critical to the continued viability of the arbitral process and the maintenance of industrial peace.

Like the Arbitration Board in Humble Oil, supra, Arbitrator Gill was also faced with the task of deciding a dispute concerning rights expressly defined in the collective bargaining agreement but without sufficient specificity and elaboration as to clearly address the precise issue presented by the parties' dispute. That is, Arbitrator Gill, in his capacity as the bargained-for interpreter of the labor agreement, found that while the agreement contained express provisions dealing with

general rights involved in the Aresco dispute -- the seniority rights of recalled employees, employees' rights to sidecar payments, and the retroactivity of arbitration awards, none of these provisions, taken separately or together, indicated how the precise problem raised by employee Aresco should be resolved. Because of the opaqueness of these provisions in relation to the Aresco dispute, Arbitrator Gill turned to one of "a typical battery of construction techniques" in order to learn what the parties' intent might be. While the Arbitration Board in Humble Oil, supra, referred under similar circumstances to a Special Agreement extraneous to the labor contract as well as to the bargaining history behind that contract, Arbitrator Gill referred to oral agreements which he found to be part and parcel of the parties' bargaining history. Hence, whether this Court is of the opinion that Arbitrator Gill referred to extraneous oral agreements or to the parties' bargaining history embodied in oral agreements, as the District Court found, he did not exceed his authority under the clear precedent established by this Court in Humble Oil & Refining Co. v. Local 866, Int'l Bro. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, supra, and his award draws its essence from ^{11/} the collective bargaining agreement.

^{11/} The Humble Oil case is not this Court's only ruling on the precise question of the propriety of an arbitrator using evidence extraneous to the collective bargaining agreement. In Medo Photo Supply Corp. v. Livingston, supra, this Court affirmed without opinion a District Court's decision ordering confirmation of an award where the arbitrator, in reaching his decision, relied on a previous arbitration award rendered by a different arbitrator. Accord, Bell Aerospace Co. Div. of Textron, Inc. v. Local 516, Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America, supra at 923.

The wisdom of the Second Circuit's approach to reviewing arbitration awards manifested in the Humble Oil case is underscored by the fact that other Courts of Appeals have adopted an identical approach. For example, in Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. White Motor Corp., 505 F.2d 1193 (8th Cir. 1974), cert. denied, 421 U.S. 921 (1975), the Court of Appeals for the Eighth Circuit affirmed a District Court's order enforcing an arbitration award even though the arbitrator, in attempting to resolve a dispute covered by an express contract provision which did not clearly deal with the specifics of the problem before him, declined to limit his analysis to the explicit terms of the collective bargaining agreement and pension plan. Rather, he also examined and relied upon the history of the parties' pension arrangements, embodied in three separate documents extraneous to the collective bargaining agreement. The Court, citing the Humble Oil case, found this to be a perfectly proper exercise of his arbitral powers. Accord, Anaconda Co. v. Great Falls Mill & Smeltermen's Union No. 16, 402 F.2d 749 (9th Cir. 1968).

Although the Court's scope of review of arbitration awards is so strictly limited as to preclude judicial review of the arbitrator's reasoning in making his findings of fact and contractual interpretations, in this brief we have analyzed Arbitrator Gill's reasoning in some depth. We have engaged

in this analysis to emphasize that, far from adding to or amending the labor agreement in violation of the scope of his authority, he applied its express provisions to the Aresco controversy in light of the intent of the parties. That he discovered this intent by referring to the parties' bargaining history embodied in oral agreements was a permissible resort to one of the "typical battery of construction techniques" upheld by this Court in the Humble Oil case. Indeed, in this case it was veritably the arbitrator's duty to employ such techniques in order to give effect to the opaque provisions of Article X, Section 3(g), Article XVII and Article IX, Section 3 -- the "cold and cryptic words on the face of the agreement which shed little light on the issue" before him. Humble Oil & Refining Co. v. Local 866, Int'l Bro. of Teamsters, Chauffeurs, Warehousemen and Helpers, supra at 232. It was on this basis that the District Court found that Arbitrator Gill, acting well within the scope of his authority, rendered an award which draws its essence from the collective bargaining agreement, and it is on this basis that this Court should affirm the District Court's order confirming the Gill award.

CONCLUSION

For all of the reasons set forth hereinabove, the decision of the District Court should be affirmed with costs assessed against the Company.

Respectfully submitted,

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Dated: March 31, 1977

APPENDIX TO
BRIEF FOR APPELLEES

Biography of Arbitrator Lewis M. Gill

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Home: 527 Baird Road, Merion, Pa.

Born February 4, 1912. Attended Swarthmore College
(A.B., 1933); Univ. of Pennsylvania Law School,
1936.

Formerly with NLRB, 1937-41; chairman, Regional War
Labor Board, Cleveland, 1942-44; public member,
National War Labor Board, 1944-46; director,
Labor Standards Association, Philadelphia, since
1946.

Affiliated with National Academy of Arbitrators.

Permanent umpire Mack Truck Co. and UAW, 1962--;
member, contract Panel of Umpires, Bethlehem
Steel Co. (Shipbuilding Div.) and Industrial
Union of Marine & Shipbuilding Workers, 1961 --.

Cases reported:

See also CDI 21-30, p. 844; CDI 31-40, p. 1560.
Novo Industrial Corp., 41--921
Bethlehem Steel Co., 42--677
Bethlehem Steel Co., 44--457
Philadelphia Orchestra Assn., 46:513
Bethlehem Steel Corp., 47:31, 270
Bethlehem Steel Corp., 48:1, 190, 223

Certificate of Service

I hereby certify that two (2) copies of the foregoing Brief For Appellees have been served by mailing the same, postage prepaid, this 31st day of March, 1977, to each of the following counsel for the Appellant:

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INTERNATIONAL SILVER COMPANY,

Plaintiff-Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, AND LOCAL #7770
U.S.W.A. AND ANTONIO ARESCO,

Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLEES
ERRATA

On page 24, line 13, delete the phrase "In these cases" and substitute in lieu thereof the word "Indeed".

On page 28, lines 1 through 3 of footnote number 11, delete the first sentence. On page 28, line 4 of footnote number 11, delete the word "In" and substitute in lieu thereof the phrase "See also", and insert the word "where" before the word "this".